



U.S. Department of Justice

United States Attorney
Eastern District of New York

JB:TM/SEF
F.#2005R00060

271 Cadman Plaza East
Brooklyn, New York 11201

January 5, 2011

By ECF & Hand Delivery

The Honorable Nicholas G. Garaufis
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Vincent Basciano
Criminal Docket No. 05-060 (NGG)

Dear Judge Garaufis:

The government respectfully submits this letter in response to the defendant's letter, dated December 28, 2010, in which Basciano renews his request that the government be ordered to produce (1) an ex parte affidavit submitted to Judge Levy in connection with an ex parte hearing related to a list on which Basciano had written the names of Your Honor, AUSA Andres, and three cooperating witnesses ("the List"); and (2) the transcript of that hearing held before Magistrate Judge Levy regarding the defendant's placement in Special Administrative Measures ("SAMs").¹ With his letter, Basciano requests the production of certain materials that this Court has previously found that he is not entitled to in a decision that was affirmed on appeal by summary order. For the reasons discussed herein, Basciano is not entitled to the ex parte materials, and his application should be denied.

I. Background

As the Court is well aware, following the government's imposition of SAMs on Basciano in the fall of 2006, a hearing was held before Magistrate Judge Levy in connection with a habeas petition filed by Basciano. During the pendency of the habeas proceedings, the defendant repeatedly challenged the reliance on ex parte evidence in the judicial determinations regarding the propriety of the SAMs. (See, e.g., Basciano Ltr. of April 6,

¹ The ex parte materials Basciano seeks are collectively referred to herein as the "ex parte materials."

2007, at 3, 07-CV-421, Docket Entry No. 14 (demanding the production of the cooperating witness who supplied the List for cross examination); Petitioner's Objections to the Magistrate Judge's Report and Recommendation, at 6, 07-CV-421, Docket Entry No. 24; Reply Mem. in Supp. of Def.'s Habeas Petition, 07-CV-421, Docket Entry No. 39). Following a hearing and extensive briefing related to the habeas petition before the Honorable Robert M. Levy, this Court adopted Judge Levy's recommendation to deny the petition. See Basciano v. Lindsay, 530 F. Supp. 2d 435 (E.D.N.Y. 2008) (adopting magistrate judge's decision in part). The Court subsequently denied the defendant's motion for reconsideration of that decision. Basciano v. Lindsay, No. 07-CV-421, 2008 WL 1700442, at *2 (E.D.N.Y. Apr. 9, 2008). That decision was affirmed on appeal, Basciano v. Martinez, 316 Fed. Appx. 50 (2d Cir. Mar. 20, 2009), and the defendant's petition for a writ of certiorari was denied, Basciano v. Martinez, 130 S. Ct. 539 (2009).

Of relevance here, in Magistrate Judge Levy's Report and Recommendation, he expressly found that revealing the details of the ex parte materials to Basciano was not appropriate. See Report & Recommendation, at 12 (07-CV-421, Docket Entry No. 12) ("I agree with the government that revealing the details of the in camera proffer and affidavit would unduly expose the government's cooperating witness to danger."). Relatedly, in denying a motion by Basciano for a bill of particulars, the Court concluded in December 2008 that "[t]he risk of danger is a pervasive, omnipresent concern in this prosecution."). Mem. & Order, dated December 31, 2008, at 7 (05-CR-060, Docket Entry No. 593). With respect to the cooperating witness who provided the List, the Court denied Basciano's request for a bill of particulars, including, among others things, his request for the identity of the cooperating witness, concluding, in part, as follows: "To the extent Basciano seeks the identity of the Government's inmate informant, his request seeks discovery outside the proper scope of a bill of particulars and is also denied due to the security concerns expressed in Section II.A supra." Id. at 22.

In addition, in Basciano v. Lindsay, the Court rejected the defendant's argument that reliance on the ex parte affidavit violated his Sixth Amendment Confrontation Clause rights, concluding that "[t]he holding in Crawford [v. Washington], 541 U.S. 36 (2004),] was explicitly limited to the right of confrontation as it applies to the use of testimonial statements of witnesses absent from trial." 530 F. Supp. 2d at 445. The defendant now requests disclosure of the same ex parte affidavit,

and the ex parte hearing minutes, claiming that they are needed to prepare his defense.

II. Argument

Basciano's request for the disclosure of the ex parte materials is without merit, and should be denied. First, Basciano's instant application simply repackages his prior arguments, made in the context of his petition for a writ of habeas corpus, which, as noted, this Court rejected nearly three years ago. See Basciano v. Lindsay, 530 F. Supp. 2d at 445.

Second, although Basciano invokes various federal rules and cases and asserts that the ex parte materials are material to the preparation of his defense, he does not offer any legal authority in support of his motion and the government is aware of none. Rather, Basciano's motion appears to be another effort to require the government to disclose information that could assist Basciano in identifying the cooperating witness who provided the government with the List. As Judge Levy found, such disclosure "would unduly expose the government's cooperating witness to danger." Report & Recommendation, at 12 (07-CV-421, Docket Entry No. 12).

Third, to the extent Basciano relies on Rule 16 and other case law in support of defendants' rights to discovery, he has failed to articulate how the ex parte materials are needed to adequately prepare his defense. As set forth in Basciano's letter, his defense strategy with regard to the List appears to be focused on an effort to "attack" "the thoroughness and good faith of the government's investigation (in general and with respect to the Andres solicitation charge in particular), an investigation that relied on unreliable informants whose unreliability the government either failed to recognize, ignored or consciously avoided." Def. Ltr. at 2. He further argues that "the government has acknowledged the relevance of the list as it relates to the Andres solicitation charge." Id. at 3.

As the Court is aware, however, Basciano is no longer charged with the Andres solicitation, as the racketeering charge that included that predicate act was dismissed by the Second Circuit in United States v. Basciano, 599 F.3d 184 (2d Cir. 2010). In light of that procedural development, Basciano's

arguments as to the List's relevance are not apposite.² Moreover, Basciano entirely fails to articulate how the government's allegedly negligent investigation into the List allegations is relevant to the charges for which he is facing trial, which are limited to charges related to the Pizzolo murder in 2004 and a solicitation to murder Patrick Defilippo in 2003-2004, both of which are alleged to have occurred more than two years prior to the revelation of the List. Accordingly, Basciano has failed to demonstrate how the ex parte information he seeks is relevant - much less material - to his defense. See Fed. R. Crim. P. 16(a)(1)(E)(i).³

Fourth, as set forth in detail in the Government's April 2009 Opposition to Basciano's Pre-Trial Motions (05-CR-060, Docket Entry No. 668), at 35-37, the List is not admissible by Basciano at trial as it is hearsay, not relevant to the charges, and could confuse and mislead the jury.

Finally, Basciano's additional arguments as to why he is entitled to additional discovery regarding the list because of the capital nature of his case should be rejected.⁴ As persuasively analyzed by Magistrate Judge Cheryl Pollak in United

² Indeed, Basciano's position regarding the List's relevance and admissibility is extremely difficult to discern, as he has taken inconsistent positions regarding the List. For example, in his February 2009 Pre-Trial Motion, Basciano argues both that the list should be precluded entirely from the trial, but also argues that he should be permitted to admit it during the guilt phase of trial. See Mem. in Support of Pre-Trial Mots., at 59-65, 05-CR-060, Docket Entry No. 631.

³ Should the government seek to introduce the List at trial, the identity of the cooperating witness who provided the List, all pertinent Section 3500 material and other impeachment material to which Basciano is entitled will of course be produced prior to the witness's testimony.

⁴ As the government noted in its April 2009 Opposition to Basciano's Pre-Trial Motions, the government does not intend to introduce the List in its case-in-chief, but that position could change if Basciano is permitted to introduce the List as evidence in the guilt phase, as Basciano has moved in limine to do. (05-CR-060, Docket Entry No. 668).

States v. James, No. 02 CR 778, 2007 WL 914242, at *4-6, *14, *22 (E.D.N.Y. Mar. 21, 2007), the Supreme Court's capital jurisprudence does not impose any heightened discovery obligations on the government:

Defendant reiterates his earlier argument that because the Court in Rompilla v. Beard, 125 S. Ct. 2456 (2005), held that defense counsel bears a heightened responsibility to investigate and obtain mitigating evidence in defendant against capital charges, so must the government be held to heightened discovery obligations with respect to proof of aggravating factors None of these cases, however, addressed the scope of the prosecution's obligation to provide discovery of certain material otherwise not generally subject to production under the Federal Rules of Criminal Procedure, nor do these cases provide a basis for ignoring established statutory guidelines for discovery. . . .

Similarly, to the extent that defendant seeks disclosure of the overt acts that the government intends to prove during the penalty phase, these cases do not speak to the government's obligation to disclose at this time the overt acts or the evidence supporting these overt acts. Rompilla, Wiggins, Williams, and Kimmelman establish minimum requirements for the diligence of death penalty counsel in investigating facts relevant to sentencing, but they neither broaden the scope of discovery nor alter the responsibilities of the prosecution. . . .

In response, the government correctly notes that the Supreme Court in Rompilla did not impose a heightened duty on the prosecutor, nor did it indicate that the rules governing discovery in non-death penalty cases no longer apply when the government has filed a notice of intent to

seek the death penalty under 18 U.S.C. 3593(a). It is well-established that while a defendant has a "right to notice of the charges against which he must defend," Gray v. Netherland, 518 U.S. 152, 167-68 (1996) (citing cases), there is "no general constitutional right to discovery in a criminal case.'" Id. at 168. . . .

Moreover, to the extent that defendants seek an order compelling the immediate production of Jencks Act material, their motions should be denied because no authority has been cited to support a deviation from Second Circuit precedent. While the Court recognizes the heightened responsibility placed on the defense by Rompilla, the Court finds no basis in that decision for ignoring the explicit provisions of 18 U.S.C. § 3500 and its interpreting caselaw.

In sum, the fact that Basciano is charged with a capital offense does not impose a heightened discovery obligation on the government, nor does it entitle him to additional discovery materials. For all of these reasons, his request for the materials is without merit and should be denied.

III. Conclusion

For the foregoing reasons, the government respectfully submits that the defendant's application requiring the government to disclose the ex parte affidavit submitted to Judge Levy and the minutes of the ex parte hearing held before Judge Levy should be denied.

Respectfully submitted,

LORETTA E. LYNCH
United States Attorney

By: /s/
Taryn A. Merkl
Nicole M. Argentieri
Jack Dennehy
Stephen E. Frank
Assistant U.S. Attorneys
(718) 254-6064/6232/6133/6143

cc: Defense Counsel (by ECF)
Clerk of Court (by ECF)